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JUDGEMENTS

ON HUMAN RIGHTS

Editor
P.D. MATHEW

INDIAN SOCIAL INSTITUTE

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Judgements on Human Rights

Editor
P.D. Mathew

Associate Editors
T. Chacko
Seema Midha

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Introduction

In this issue we have included some of the recent important High Court judgements along with Supreme Court decisions.

Constitutional Laws

The Supreme Court judgement on Constitutional law in the case of *Federation of All India Customs and Central Excise Stenographers v. The Union of India* once again interprets the doctrine of 'equal pay for equal work' in the light of factors like nature of work, functional requirements and responsibilities entailed in the work undertaken. Work may be equal in volume but there may exist a qualitative difference as regards reliability and responsibility.

Criminal Laws

A historic decision of the court regarding criminal law was passed by the Supreme Court in the case of *Hari Kishan and State of Haryana v. Sukhbir Singh*. The court has recommended that courts should liberally exercise their powers of awarding compensation to their victims of offence under Section 357 of Cr.P.C.

Double punishment is not barred when there are two distinct and separate offences committed by the same person. However, in the case of *The State of Bihar v. Murad Alikhan* the court has held, that if the same offence has been included in two enactments but certain ingredients of the offence are differently posited in the two enactments, the bar of double jeopardy is not attracted.

Labour Laws

A decision of momentous significance was given in the case of *Navnit R. Kamani v. V.R.R. Kamani*, opening up new vistas in the history of labour law, proving an opportunity to the employees to take over the management of a sick company. This is bound to prove a great morale booster for the labourers in India and encourage them to build their future with their own hands.

Industrial Disputes Act, 1947 was enacted mainly to prevent exploitation of the labourers and to regulate employer-employee relationship. When the Industrial Tribunal had made an award in honour of the workers—precisely with this objective in view, the Supreme Court has held in the case of *Calcutta Port Shramik Union v. The Calcutta River Transport Association* that the High Courts should not interfere with the award on hyper-technical grounds.

Reservation policy should be implemented to give benefit of job opportunity and promotional facilities to the Scheduled Castes and Scheduled Tribes. In the case of *Municipal Corporation of Greater Bombay v. Mrs. Kalpana Sadhu Kamble* the Supreme Court has held that reservation policy adopted at a later date should not have the effect of displacing lawfully promoted candidates, earlier to that date.

In the case of *Kusheshwar Dubey v. Bharat Coking Coal Ltd*, the Court has ruled that in case of simultaneous disciplinary proceedings with criminal proceedings against a person, disciplinary proceedings should be dropped till the criminal case was decided. However, the court has cautioned against interpreting this decision as a rigid formula. Peculiarities and circumstances of each case must be taken into account.

In *State Bank of Bikaner & Jaipur v. Jag Mohan Lal*, the Supreme Court has decided that extension of service is never as a matter of right but is at the discretion of the management and in keeping with the interest of the organisation.

Payment of Gratuity sometimes involves unnecessary delay causing hardship to a retired employee. A 1987 amendment in the Payment of Gratuity Act 1972 has introduced a provision regarding payment of interest on the delayed payment of gratuity. However in the case of *Charan Singh v. Birla Textile*, since the application for payment of interest on gratuity had been made prior to the amendment, it was rejected by the Court on the ground that as required under previous rules, no application to the collector had heen made for the purpose.

Family Laws

Divorce, on the plea of mere existence of 'mental disorder' in the spouse, cannot be granted as a matter of right. As ruled by the Supreme Court in the case of *Ram Narain Gupta v. Smt. Rameshwari Gupta*,

to justify dissolution of marriage, 'mental disorder' has to be of such degree and to such an extent that the spouse seeking relief cannot reasonably live with the other.

Muslim Women (Protection of Rights on Divorce) Act 1986 has not been given any retrospective effect. The court has accordingly upheld the order of maintenance granted to a Muslim woman under Section 125 Cr.P.C. prior to the enforcement of the Act in the case of *S.K. Mohammad Ali v. Salima Khatoon.*

Jail is not a mode of satisfaction for non-payment of maintenance arrears. The Supreme Court has differentiated between 'mode of recovery' and 'actual recovery' of maintenance dues, in the case of *Smt. Kuldip Kaur v. Surinder Singh* and ordered for the actual recovery of maintenance for the destitute family.

In a Orissa High Court ruling, it has heen decided in the case of *Abdul Kalam v. Akhtari Bibi*, that Guardians and Wards Act (8 of 1890) applies to Mohammedans also and a Muslim mother is entitled to the custody of two year-old child.

Land Laws

'Bhoodan movement' was started with a view to providing land to poor 'Bhoomihin' labourers. However the term 'Bhoomihin' was worded as 'landless' in the U.P. Bhoodan Yagna Act. Taking advantage of the literal interpretation of the term 'landless' certain unscrupulous and rich people from the city started grabbing the land donated for the poor. The Supreme Court ruling in the case of *U.P. Bhoodan Yagna Samiti v. Braj Kishore*, rejecting the claim of such propertied persons to agricultural land under the Bhoodan Scheme, has denunciated literal interpretation of the provisions without taking into view the object and aim of the enactment.

I
Constitutional Law

1. "Equal Pay for Equal Work" Depend upon the Nature of the Work Done

FEDERATION OF ALL INDIA CUSTOMS AND CENTRAL EXCISE STENOGRAPHERS v. THE UNION OF INDIA

"Equal pay for equal work" is a fundamental right. But it must depend upon the nature of the work done. It cannot be judged by the mere volume of work. There may be qualitative difference in the nature of work as regards reliability and responsibility. Functions may be the same but the responsibilities make all the difference. All similar work cannot be reduced to 'equal work' and the problem about equal pay cannot always be translated in a mathematical formula.

In this case petition was made under Article 32 by the Stenographers (Grade I), who were attached with Government officers in the pay scale of Rs 2500-2750, seeking parity with the pay scale of the Stenographers attached to the Joint Secretaries and officers above that rank. The petitioners claimed that they should be placed in the pay scale of Rs 650-1040 with effect from 1st January 1973. The petition was filed in May 1982, but came up for hearing in November 1986, i.e. after the Fourth Pay Commission's Report.

The petitioners asserted that basic qualifications, method, manner and source of recruitment and grade of promotions in their respect were the same as those of their counterparts attached to the Joint Secretaries/Secretaries and other officers in the Secretariat. They submitted that between them and their Secretariat counterparts all things were equal i.e. all relevant considerations governing both were the same and they held identical posts. They discharged the same functions and indeed, sometimes more onerous duties and responsibilities than their counterparts. It was also stressed that even on the criteria adopted by the Third Pay Commission there was no basis for any differ-

entiation between the petitioners and their counterparts. While the petitioners were placed in a grade of Rs 550-900 their counterparts were in the pay scale of Rs 650-1040. The petitioners asserted that this was discrimination which was a clear violation of Articles 14 and 16(1) of the Constitution of India.

The respondents i.e. Union of India denied the discrimination. Shri S.P. Kundu Under Secretary to the Government of India, Ministry of Finance filed the affidavit and asserted that the Secretariat and the Ministry/Department of the Government of India together constitute Headquarters Organisation. In the administration of the Central Government, the Secretariat occupies a key position and the main role of the Secretariat is to help the Government in the tasks of formulation of policies and to ensure the effective execution of government policies through periodical review. The Secretariat also helps ministries to discharge their accountability to Parliament. To man the various stenographic posts in the Headquarters the Government had constituted the Central Secretariat Stenographers Service (CSSS) which was also catering to the needs of such posts in several attached offices known as participatory offices.

It was also clarified that execution of Government's policies, specially in the field, left to the agencies outside the Secretariat called attached or subordinate offices of the ministries but they are always subject to supervision by the Secretariat. Therefore, keeping in view the importance and the nature and the type of work performed in the Ministries/Departments of the Government of India this difference in salaries exists. It was emphasised that the difference in the functional requirements of the work done was one of the points. In devising any scales of various posts/categories, the degree of skill, experience involved, training required, responsibility taken, strain, fatigue, risk and confidentiality undertaken, mental and physical requirements are factors to be borne in mind. The respondents contended that though the duties and work were identical between the petitioners and their counterparts attached to secretaries in the Secretariat, their functions were not identical with regard to their duties and responsibilities which were of higher and more responsible nature in the case of stenographers attached to the Secretariat. The Third Pay Commission had also recommended different scales of pay for stenographers in CSSS and those in the non-participating attached and subordinate office like petitioners on the same ground.

The Supreme Court considered the case in depth. Arguments and counter arguments were examined and it was held that though equal pay for equal work is a fundamental right, equal pay must depend upon the nature of the work done. There may be qualitative difference as regards reliability and responsibility performed by the two groups of workers. One cannot deny that often the difference is a matter of degree and that there is an element of value judgement by those who fix the pay scales. So long as the value judgement is made bonafide, reasonably, on an intelligible criteria which has a rational nexus with the object of differentiation, such differentiation will not amount to discrimination. In the instant case the differentiation has been sought to be justified in view of the nature and type of the work done and responsibility involved, which the court held, was an intelligible basis. It could not be said therefore, that differentiation was based on no rational nexus with the object sought to be achieved. Taking the above view of the matter the court dismissed the petition.

[Decided on 5th May 1988. For the original text please refer to CLR (1988) II SC 109 (July).]

II
Criminal Law

1. Power of Compensation to Victims should be Liberally Exercised

HARI KISHAN AND STATE OF HARYANA v. SUKHBIR SINGH

This is a historic decision wherein the Supreme Court has recommended that courts should liberally exercise their powers under Section 357 of Cr.P.C. to award compensation to victims of offence. So far our courts have seldom invoked this Section, perhaps due to ignorance of the objective of the provision. In addition to conviction under this provision, the court may order the accused to pay some amount by way of compensation to the victim who has suffered by the action of the accused. This power of courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power reassures the victim that he is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It constitutes a constructive approach to crimes.

The Supreme Court by this decisions has recommended to all courts to invoke S. 357(3) liberally so as to meet the ends of justice in a better way.

In this case the rival parties were relatives. On 28/9/82 at about 9 a.m. they had an altercation near the tubewell of Harikishan. Joginder was the son of Harikishan. There was another victim Virinder who was the nephew of Hari Kishan. The accused, who were armed with 'Ballams' and 'Dargas' attacked Joginder and Virinder. Some of the accused were also injured in this process. The injured were removed to civil Hospital, Ballabgarh. The Medical Officer referred them to Safdarjung Hospital, New Delhi. Finally they were admitted in AIIMS, New Delhi. They were examined by the doctors who found that Virinder

had two injuries caused by blunt weapons and Joginder was found with head injuries. Among the accused, Siri Chand, Dhan Pal, Ompal, Sikhbir Singh were also injured and they were also medically examined by the doctors and found that Siri Chand had four simple injuries. These were also caused by blunt weapons. Sukhbir Singh had one incised wound on his person. The case was registered under Section 307/149 IPC and the lower court convicted the accused. But the High Court acquitted two of the accused giving them the benefit of doubt, though each of the accused was ordered to pay Rs 2,500 to Joginder as compensation. High Court also suspended the sentence of the remaining accused and ordered their release on probation of good conduct. The appeal was filed against the acquittal.

It was contended by the appellants that the High Court had heen too lenient to the accused. The intention of the accused was obviously to commit murder of Joginder. It was urged that Joginder had sustained permanent disability due to head injury and the accused deserved punishment of severest order. At any rate they ought not to have been put on probation.

Thus three main questions arose before the Supreme court for consideration:

(i) whether the respondents were not guilty of the offence under Ss.307/149, IPC;

(ii) whether the High Court was justified in releasing the accused on probation for good conduct; and

(iii) whether the compensation awarded to Joginder could be legally sustained, and if so, what should be the proper compensation.

Regarding the first question, the court observed that the following has to be borne in mind:

> Under Section 307 IPC the court has to see whether the act irrespective of its result was done with the intention and knowledge. The intention or knowledge of the accused must be such as is necessary to constitute murder. Without this ingredient being established, there can be no offence of "attempt to murder" under Section 307 IPC. The intention is to be gathered from all circumstances and not merely from the consequences. The nature of the weapon used, manner in which it is used, motive for the crime, severity of the blow, the part of the body where the injury is inflicted, are some of the factors to determine the intention.

In the instant case, the accused never used the sharp edge of ballams in spite of provocation. This proves that they had no intention for murder. The fight, as High Court observed, might have been a sudden flare-up. Where the fight is accidental owing to sudden quarrel, the conviction under Section 307 is generally not called for. The acquittal of the accused under Section 307, therefore, was to he upheld.

As to the next question regarding the release of the accused on probation of good conduct, the court held that:

> When the offenders are not dangerous criminals but are of weak characters who have surrendered to provocation the court should encourage their own sense of responsibility for their future and protect them from the stigma of possible contamination of prison. In this case, the occurrence was the outcome of sudden flare-up and the accused had no intention to commit muder. Therefore the benefit of probation of good conduct was rightly given to the accused. Moreover the exercise of benefit of the beneficial legislation applicable to first offenders cannot be said to be inappropriate.

As to the third question regarding the compensation to the victim in criminal cases, the High Court directed each of the accused to pay rupees 2500 as compensation to Joginder but did not refer to any provision of law in support of the order of compensation. Supreme Court held that law for giving compensation can be traced to Section 357 of Criminal Procedure Code (quote AIR p. 2130 Dec '88). This is an important provision empowering the court to award compensation to victims while giving judgement of conviction. The payment, by way of compensation, however must be reasonable, depending upon the facts and circumstances of each case. The nature of crime, the justness of claim by the victims, responsibility of each of the accused and the ability of the accused to pay are some of the factors to be taken into account while determining the quantum of compensation.

Since Joginder in this case had suffered permanent impairement of speech due to his injuries the compensation awarded by the high Court was inadequate. The Supreme Court with due regard to all the facts and circumstances of the case and considering the ability of the accused to pay, enhanced the amount of compensation to Rs 50,000.

[Decided on 25 August 1988. For the original text please refer to AIR (December) 1988 SC 2127.]

2. Bar of Double Jeopardy not Attracted where Ingredients of an Offence are Different in Two Enactments

THE STATE OF BIHAR v. MURAD ALIKHAN

If there are two distinct and separate offences with different ingredients under two different enactments, a double punishment is not barred. However, as held in this case, where certain ingredients of an offence under two enactments are different, bar of double jeopardy is not attracted.

On 25th June 1986, the Range Officer of Kunduruguta Range forest filed a complaint with the Judicial Magistrate, Chaibasa, under Section 51 of the Wild Life Protection Act, 1972 accusing the three respondents of having killed an elephant in the forest and removing its ivory tusks. The Magistrate took cognizance of the offence and ordered issue of process to the accused. It appeared that a case against the accused had heen registered at the police station Sonua under Sections 447, 429 znd 329 of IPC, read with Ss. 54 and 39 of the Wild Life Protection Act, 1972 and that the matter was under investigation by the police. The accused moved the High Court under Section 482, Cr.P.C. for quashing of the order of the Magistrate taking cognizance of the alleged offence and issuing summons. It was contended that this was a case to which S. 210(1) of Code of Criminal Procedure, 1973 was attracted. According to S. 210(1) of Cr.P.C.,

> When in a case instituted otherwise than on a police report (hereinafter referred to as a complaint case), it is made to appear to the Magistrate, during the course of the inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject-matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police officer conducting the investigation.

The High Court, accordingly, quashed the proceedings against the accused. The State Government appealed to the Supreme Court against the decision of the High Court.

The High Court had based its decision on two grounds. The first was that the Magistrate acted contrary to the provision of S. 210 of Cr.P.C. The second ground was on the merits of the complaint. The High Court had observed:

> On the face of the complaint petition of the first information report itself the facts alleged do not constitute the offence. The petitioner was never named in the first information report. There is no eyewitness in this case and there is no identification of the petitioner in any manner whatsoever to sustain the allegation even 'prima facie' for the offence alleged.

The Supreme Court observed that the policy and object of Wild Life Laws have not been taken into consideration by the High Court. The Wild Life Laws have heen enacted as a result of increasing awareness of the compelling need to restore the serious ecological imbalances introduced by the depredation inflicted on nature by man. The laws reflect a last ditch battle for the restoration of the speedy deterioration of environment due to the callous insensitivity of mankind. Section 9(1) of the Act says that no person shall hunt any wild animal specified in Schedule I. Elephant is included in Schedule I. Section 51 of the Act provides for penalties. Section 55 deals with cognisance of offences.

> 55. No court shall take cognisance of any offence against this Act except on the complaint of the Chief Wild Life Warden or such other officer as the State Government may authorise in this behalf.

The Range Officer who lodged a complaint with the Magistrate against the accused, on 23rd June 1986, claimed to be such an officer. Under the circumstances, the Supreme Court held, even if the jurisdictional police purported to register a case for an offence under the Act, S. 210(1) would not be attracted considering that cognisance of such an offence could be taken only on the complaint of an authorised officer. The view taken by the High Court on the footing of S.210 was, thus, held unsupportable.

As regards the second ground, the Supreme Court observed that jurisdiction under Section 482 Cr.P.C., which empowers High Court to make such orders as may be necessary to prevent abuse of the process of any court or otherwise to secure the ends of justice, has to be exercised sparingly and with circumspection. . . . The High Court has to

consider whether allegations set out in a complaint or the chargesheet do not in law constitute any offence and whether resort to criminal proceedings would amount to an abuse of the process of the court under the circumstances. On reading the complaint lodged by the Range Officer which gave full details of the offence committed and included the confession of one of the accused regarding his part in the crime, it was difficult to agree with the High Court that allegations in the complaint, taken on their face value, did not amount in law to any offence under the Act.

It was further contended by the accused that the offence envisaged by S. 9(1) read with S. 2(16) and S. 50(1) of the Act, in its ingredients and content, is the same as S.429 IPC. After due investigation, the police had filed a final report that no offence was made out under S.429 IPC. According to S. 429 IPC.

> Whoever commits mischief by killing, poisoning, maiming or rendering useless, any elephant, camel, horse, mule, buffalo, bull, cow or ox, whatever may be the value thereof, or any other animal of the value of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extent to five years, or with fine, or with both.

The offence of hunting any wild animal as defined in S. 9(1) read with S. 2(16) of the Act is much wider. S. 56 of the Act provides:

> 56. Nothing in this Act shall be deemed to prevent any person from being prosecuted under any other law for the time being in force, for any act or omission which constitutes an offence against this Act or from being liable under such other law to any higher punishment or penalty than that provided by the Act.

Section 26 of the General Clauses Act, 1897 also provides:

> Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.

Broadly speaking, a protection against a second or multiple punishment for the same offence, technical complexities aside, includes a protection against re-prosecution after conviction and a protection

against double or multiple punishment for the same offence. But difficulties arise in the application of the principle in the context of what is meant by 'same offence.'

In the *State of Bombay v. S.L. Apte* [(1966) 3 SCR 107] the court had observed:

> To operate as a bar the second prosecution and the consequential punishment thereunder, must be for 'the same offence.' The crucial requirement, therefore, for attracting the Article is that the offences are the same, i.e. they should be identical. If, however, the two offences are distinct, then, notwithstanding that the allegations of facts in the two complaints might be substantially similar, the benefit of the ban cannot be invoked.

The same set of facts can constitute offences under two different laws. An act or an omission can amount to and constitute an offence under the IPC and at the same time under any other law. Supreme Court held that the ingredients of an offence under S. 9(1) read with S. 50(1) of the Wild Life Act require for its establishment certain ingredients which are not part of the offence under S. 429 and vice versa. As a result the order of the Magistrate taking cognisance of the offence and issuing summons to the accused was restored and ordered that criminal case initiated on the complaint would proceed in accordance with law.

[Decided on 10th October 1988. For the original texi please refer to IJR (1988)18 SC 313 issue No. 48.]

III
Labour Law

1. Workers to have an Opportunity to Manage the Company

NAVNIT R. KAMANI v. V.R.R. KAMANI

This is a historic judgement giving the workers for the first time an opportunity of managing their own affairs, shaping their own destiny and building their own future.

Internal discord gave rise to disputes and litigations between different branches of a family on the death of the head of the industry. In the course of the said proceedings, it came to light that Kamani Tubes Limited had stopped production and ceased to be in operation in August 1985, that the workers were not paid wages for over eight months, and that Employer's contribution to provident fund actually deducted from the wages had been wrongfully retained by the management. Workers, through their union, filed a suit seeking the relief of sale of shares of Kamani Tubes Limited to their union (KEU) and to direct the BIFR (Board for Industrial and Financial Reconstruction) to consider the scheme of the union for revival and rehabilitation of Kamani Tubes Limited. In pursuance of the direction of the Supreme court, BIFR submitted its feasibility report. The court, by its order dated 13 October 1987 had also directed BIFR to hear the workers as well as the different groups of Kamani family before making its recommendations. As per this direction, the Board held a number of meetings which were attended by representatives of KEU, Financial Institutions, Banks, State Government, Central Government and different groups of Kamani family and IDBI (Industrial Development Bank of India) while preparing its feasibility report. The points to be considered before the Supreme Court were (i) whether the said scheme sanctioned by BIFR could be given the approval of Supreme Court or (ii) whether the scheme presented by Shri A.P. Kamani deserves to be

considered having regard to his claim that his scheme was better than the workers' scheme.

The scheme presented by Shri A.P. Kamani, who claimed to hold 24% of the shares of Kamani Tubes Limited, could not be considered by BIFR for evaluation as it was busy framing a feasible scheme in pursuance to the orders of the Supreme Court, till the time it re dered its decision on Septemher 6, 1988. In the order dated April 20, 1988, the Court had accorded the liberty to the Board to consider any alternative scheme, at the same time leaving the matter to the discretion of the Board. There was no obligation on the part of the Board to consider any alternative scheme. So the Board could not be held responsible for not considering Mr. A.P. Kamani's scheme, which, as a matter of fact, was presented after the Board had sanctioned the workers' scheme. However the court observed that it would not be appropriate to disregard Mr. Kamani's scheme merely because it was presented late. In case he was able to persuade the court that his scheme was preferable to that of the workers' scheme, in the larger interest of all concernned, the decision rendered by BIFR would be set aside for considering the whole matter afresh. On comparison of the two schemes, the finding of the Supreme Court was that the workers' scheme was much better. Mr. Kamani's scheme suffered from some fundamental infirmities. It was not backed by any commitment on behalf of any Bank or financial institution to provide the requisite financial resources to enable the modernisation of the plant envisaged under the scheme. Mr. Kamani 'hoped' to purchase a second hand plant from a foreign country, but it was not shown how much that would cost and from where the money was going to come for its purchase. The Supreme Court, therefore, rejected Mr. A.P. Kamani's scheme as unrealistic and impractical.

To deal with the remaining question of stamping the workers scheme with the approval of the court, the provisions of the sick Industrial Companies (Special Provisions) Act, 1985, under which the Board had been constituted, were considered. The statement of objects and reasons underlying the benevolent legislation are, to provide preventive, ameliorative and remedial measures essential for reviving sick or potentially sick companies and for ensuring expeditious enforcement of the measures devised by the competent authority under the Act. Section 18 of the Act provides for the reduction of the interest and rights of the shareholders in the sick industrial companies to the extent neces-

sary for the reconstruction, revival or rehabilitation of the sick company. There is also a provision which contemplates transfer of shares in the sick industrial company at face value to the employees of that company. The intention of the legislature is to encourage the employees to take over the sick units and to invest the competent authority with power to direct the transfer of the shares to the employees in this behalf. Thus the authority and competence of the Board to issue a direction for the transfer of shares to the employees had the full backing of this benevolent legislation. BIFR, therefore, was within its rights to reduce the value of the shares from Rs 10 to Re 1 per share and direct the transfer of the shares to the employees in order to effectuate the scheme for the revival of Kamani Tubes Limited. The scheme had also heen considered feasible and economically viable by other experts. It had the full backing of the nationalised banks and the encouragement from the Central Government and State Governments which even made commitments for granting tax concessions. The most important point in its favour was that it had been framed by employees who themselves were making tremendous wage-sacrifice in order to salvage the sick company.

On the above considerations, the Supreme Court considered it appropriate to grant its approval to the workers' scheme, hoping thereby that the success of this venture would instil new confidence amongst the workers in India encouraging them to build their future with their own hands and live with dignity and self-respect.

[Decided on 19th October 1988. For the original text please refer to CLR 1988 (II) October) SC 487.]

2. No Interference by the High Courts in Industrial Tribunal's Award on Hyper-Technical Grounds

CALCUTTA PORT SHRAMIK UNION v. THE CALCUTTA RIVER TRANSPORT ASSOCIATION

Nearly 15,000 bargemen working at the Calcutta Port were unfortunately denied of their right to receive reasonable wages and

allowances for nearly 12 years due to a very narrow view of the term 'dock worker' taken by Calcutta High Court.

The Government of India had set up a Wage Board for the port and dock workers at major ports on Novemher 13, 1964 to (a) determine the categories of employees who should be brought within the scope of proposed wage fixation (excluding Class I and Class II officers) and to (b) work out a wage structure based on the principle of fair wages as set forth in the report of the Committee of Fair Wages.

The expression 'dock worker' has been defined in Dock Workers (Regulation of Employment) Act, 1948 (hereinafter referred to as the Act) as follows:-

> 2(b) 'Dock worker' means a person employed or to be employed in, or in the vicinity of, any port on work in connection with the loading, unloading, movement or storage of cargoes, or work in connection with the preparation of ships or other vessels for the receipt or (sic) discharge of cargoes or leaving port.

The above definition 'dock worker' is of wide import and it includes all categories of workers working in a port, or in the vicinity, if they are handling cargoes. But the Wage Board did not make any recommendation with respect to bargemen, i.e. Dandees and Majhis at the port of Calcutta who were more than 15,000 in number. The bargemen raised an industrial dispute claiming the benefit of Wage Board recommendations. Accordingly the Central Government on August 22, 1970 constituted a National Tribunal at Calcutta for adjudication of the following issues:-

> Whether recommendations of the Central Wage Board for the port and dock workers as accepted by the Central Government in their resolution No. WB—21(7)/69 dated 28th March 1970 are applicable to the bargemen in the matter of wages and allowances? If not, to what other relief with regard to wages and allowances are they entitled?

In the statement filed by the trade union representing bargemen it was contended that barges, lighters and boats performed the combined functions of transit sheds, warehouses, jettis, quays, wharfs on a miniature scale and enabled loading and unloading of cargoes into and from ships and that they carried almost all the cargoes from mills, factories and establishments located at the back of the river as it was

found to be advantageous and economical to use barges, lighters and boats for loading and unloading of cargoes into and from ships because of all round lower costs. Accordingly, the trade union claimed that workmen with barges, lighters and boats were engaged in dock works and the workmen concerned fully conformed to the definition of 'dock workers' as given in the Act. It, therefore, claimed that the bargemen were also entitled to the scale fixed by the Wage Board in Para 7.2.108 of its final report. Alternatively the union claimed that if their wages were to be assessed separately then they were entitled to a minimum wage of Rs 206.40 paise on the very same considerations which led the Wage Board in its recommendations to fix the minimum wage figure as incorporated in Paras 7.1.19 to 7.1.70.

The employers, in their counter statement, contended that the bargemen did not come within the definition of 'dock workers' since they were employed mainly in the transportation of goods. The management claimed that the bargemen were neither wholly engaged in docks and streams nor were they involved in the process of unloading and loading. Secondly, the employers, disputed the correctness of the wage-fixation as made by the Wage Board on the basis that the Board did not consider the capacity of the industry to pay as laid down by the courts. Further, the management contended that the wages of the bargemen had been fixed by the Industrial Tribunal on a reference by the Government of West Bengal made on 4-1-1965 and that the wages so fixed had been revised from time to time by agreement between the parties. Since there had been no change in the circumstances, there should be no upward revision of the existing wage structure. They also pleaded that the financial capacity of the employers did not permit any further enhancement in wages.

The National Tribunal held the bargemen to be 'dock workers' and as such recognised their entitlement to get wages and allowances in accordance with the Wage Board recommendations. After taking into consideration the relevant circumstances, the National Tribunal also held that the Dandis and Majhis working under the members of the Calcutta River Transport Association, and of Bengal River Transport Association and under the Port Shipping Co. Ltd., were entitled to higher wages and allowances w.e.f. 1-1-1976 even independently of the recommendations of the Wage Board but at the same rates which had been recommended by the Wage Board.

Aggrieved by the award of the National Tribunal, the management filed two writ petitions before the High Court of Calcutta questioning the validity of the award. The Court held that the award was liable to be set aside as it was beyond the scope of reference. The reference was whether the recommendation of the Central Wage Board was applicable to the bargemen or not. It was not for the Tribunal to criticise the report of the Central Wage Board and in doing so, and in making such an award the Tribunal had exceeded its jurisdiction. On the basis of the above argument the High Court quashed the award passed by the National Tribunal.

The trade union filed an appeal before the Division bench of the High Court. The Division bench affirmed the judgement of the single judge holding that there was a serious doubt as to whether all dockworkers were entitled to be brought within the scope of the proposed wage fixation by the Wage Board. The trade union filed a further appeal in the Supreme Court.

The Supreme Court observed that the object of enacting the Industrial Disputes Act 1947 was to bring about industrial peace. Whenever a reference is made by a government to an Industrial Tribunal it has to be presumed ordinarily that there is a genuine industrial dispute between the parties which requires to be resolved by adjudication. In all such cases an attempt should be made by courts exercising powers of judicial review to sustain as far as possible the awards made by Industrial Tribunal instead of picking holes here and there in the awards on trivial points and ultimately frustrating the entire adjudication process before the Tribunals by striking down awards on hypertechnical grounds.

In the instant case the National Tribunal had rightly observed that the reference in question consisted of two distinct parts viz. one part relating to wages and allowances to be paid to the bargemen on the basis of the recommendations of the Wage Board and the other part relating to the wages and allowances to be fixed in favour of the bargemen on the basis of the demands made by the bargemen independently of the recommendations of the Wage Board. The National Tribinal's finding was that bargemen were dock workers and the Wage Board had erroneously failed to make any recommendation regarding their wages. On the basis of the evidence furnished, to the Tribunal, concluded that they had been doing similar work as other dock workers

employed by Calcutta Dock Labour Board in the matter of loading and unloading of cargo in and out of the barges. The definition of the dock workers has to be understood in the light of not only their work in the port but also consistent with the definitions of cargo, vessel, employer and the port in the Acts referred to above. The terms loading, unloading and movement of persons employed in any port in connection with the preparation of ships for the receipt or discharge of cargo would indicate that the work of bargemen came rightly within the definition of dock workers as defined in the Act. There was plenty of evidence to show that they worked at the port. The fact that one of the companies had made one of them to go beyond the port should not have the effect of excluding them from the definition of dock workers.

The Supreme Court held that the dispute had been referred to the National Tribunal because there existed doubts regarding the question whether bargemen were dock workers or not. Naturally, in order to decide the said question the National Tribunal had to examine incidentally the correctness of the decision of the Wage Board. Having come to the conclusion that bargemen were also dock workers, there was no justification for denying them the benefit of the recommendations of the Wage Board. This part of the award could not, therefore, be held outside the scope of the reference made to the National Tribunal.

The Supreme Court dismissed as unjustified the Division Bench's argument that the National Tribunal had taken into account the paying capacity of the port authorities and not that of private employers. The National Tribunal had given ample reasons in its report as to why it was in favour of adopting Wage Board's recommendations for bargemen. The judgement of High Court was set aside and the award passed by the National Tribunal was re-enforced.

[Decided on 13th September 1988. For the original text please refer to AIR (December) 1988 SC 2168.]

3. Reservation Policy to be Implemented in a Just Manner

MUNICIPAL CORPORATION OF GREATER BOMBAY v. MRS. KALPANA SADHU KAMBLE

Application of reservation policy in the government sector often meets with neglect and delay resulting in service harassment of scheduled caste employees. Where the Corporation passed a resolution adopting the government resolution regarding reservation of posts for backward classes while making promotions, the court has ruled that the subsequent promotions would be subject to the reservation policy adopted by the Corporation by that resolution and the fact of delay in the collection of statistics should not have the effect of denying the benefit of reservation to deserving candidates.

The Municipal Corporation of Greater Bombay filed an appeal against the High Court's decision affirming the judgement of the single judge in a writ petition, issuing a writ of mandamus, directing the Corporation to implement its Resolution No. 567, dated 12-9-1975. The said Resolution directed reservation of certain vacancies while making promotions from a lower cadre to a higher cadre for certain backward sections of employees of the Corporation with effect from 23-5-1979. It was provided in the Resolution that in Class I, Class II and Class III posts, in which the element of direct recruitment did not exceed 50% where promotion was to be made on the basis of seniority, 13% of vacancies should be reserved for the Scheduled Castes and the Scheduled Caste converts to Buddhism, 7% for the Scheduled Tribes including those living outside the specified areas and 4% for Denotified Tribes and Nomadic Tribes. In order to implement this scheme the government directed the maintenance of a roster of 50 vacancies in which Sl. Nos. 1, 9, 17, 25, 33, 41 and 49 were to be reserved for the Scheduled Castes and Scheduled Caste converts to Buddhism. Sl. Nos. 2, 16 and 30 were to be reserved for the Scheduled Tribes including those living outside the specified areas and Sl. Nos. 3 and 28 were to be reserved for Denotified Tribes and Nomadic Tribes. The Corporation passed the Resolution bearing No. 567 on 12-9-1975 adopting the Government Resolution, with sight modifications, with effect from 23-5-1974.

Pursuant to the Corporation's Regulation, Mrs. Kalpana Sadhu Kamble, who belonged to one of the backward classes, was promoted from the cadre of Asst. Teacher to the higher post of Deputy Head Mistress on 21-3-1977. She filed a writ petition in the High Court of Bombay requesting the High Court to issue a direction to the Corporation to promote her with effect from 23-5-1974, the date on which the government Resolution was passed. The learned single judge, who heard the case, issued a writ as prayed for. The Corporation went in appeal before the Division Bench of the High Court which was dismissed. A further appeal was filed in the Supreme Court.

The Corporation contended, firstly, that if promotions were made with effect from 23-5-1974, it would disturb the promotions made between 23-5-74 and 21-3-1977. Secondly the promotions made prior to 12-9-1975, on which date the Corporation adopted the Government Resolution, could not be disturbed.

The court held that once the Corporation passed the resolution dated 12-9-1975, any promotion made thereafter in the service of the Corporation could only be made subject to the reservation policy adopted by the Corporation. However the said resolution should not have any effect on the promotions made prior to 12-9-75 because those promotions had been made in accordance with the prevailing rules at that time. It could be unfair to distrurb the promotions made prior to 12-9-75 only because the government had passed the resolution on 23-5-74 and Corporation had adopted the said Resolution on 12-9-75. Though it was true that ordinarily Corporation could not take a plea which was inconsistent with its own resolution but, in the instant case, it would be unjust to review the promotions lawfully made between the period 23-5-74 and 12-9-75 merely because a resolution to adopt reservation policy was passed at a later date. No modification affecting service conditions of employees can be made retrospectively except under a valid law. Since no such law was placed before the court in the instant case, the court held that the writ issued by the High Court was to be modified by directing the Corporation to give effect to the promotion of Mrs. Kamble from 12-9-75 and not from 23-5-74 as had earlier been directed by the High Court.

[Decided on 30th August 1988. For the origional text please refer to AIR (December) 1988 SC 2115.]

4. Simultaneous Disciplinary Proceeding should be Stayed in Criminal Trial

KUSHESHWAR DUBEY v. BHARAT COKING COAL LTD.

The dominant purpose of a criminal proceedings is to achieve the protection of the public while that in the disciplinary proceeding is purity and efficiency of public service. Therefore their fields of operation are quite different and independent. In a disciplinary proceeding the strict rules of evidence and the standard of proof are also not required as in a criminal trial. Though there is no legal bar for simultaneous proceedings being taken against the delinquent employee yet it would be appropriate to defer disciplinary proceedings till the disposal of the criminal case.

Kusheshwar Dubey was an employee in the Bharat Colliery. In 1986 he was working as an electric helper. There was an allegation that he physically assaulted his Supervisor Shri S.K. Mandal. He was subjected to disciplinary proceedings and also a criminal prosecution simultaneously. The employee filed a civil suit in the court of Munsif Dhanbad for injunction (stay order) against the disciplinary proceedings till the disposal of the criminal case. The Munsif made an order staying further disciplinary proceedings. The employer filed an appeal against the Munsif's order in the appellate court which was dismissed on 31st March 1987. The employer moved the High Court in its revisional jurisdiction.

The High Court by its order of 7-7-1987 held: "There is no bar for an employer to proceed with the departmental proceeding with regard to the same allegation for which a criminal case is pending" and the injunction was vacated.

Aggrieved by this order of the High Court the employee appealed to the Supreme Court. The Counsel of the employee Mr. Jain argued against the legal position settled by this court and supported the stand that the disciplinary action had to be stayed till the criminal case was over. He relied upon the court's decisions in *Delhi Cloth Mill. v. Kusal Bhan* (1960)3 SCR 22 (AIR 1960 SC 806) and *Tata Oil Mills*

Co. v. Its Workmen (1964)7 SCR 555) (AIR 1965 SC 155) and referred to some decisions of various High Courts in his support. The court pointed out that there was nothing wrong in parallel proceedings and referred to the cases *Jang Bahadur v. Baijnath* (1969) 1 SCR 134) (AIR 1969 SC 30) and some decisions of the High Courts.

Mr. Jain submitted that court should settle the law on this point as judicial opinions appeared to be conflicting.

The court considered all the referred cases thoroughly and expressed that "It is neither possible nor advisable to evolve a hard and fast, strait-jacket formula valid for all cases and of general application without regard to the particularities of the individual situation." While there could be no legal bar for simultaneous proceedings being taken, yet there may be cases where it would be appropriate to defer disciplinary proceedings awaiting disposal of the criminal case.

In the instant case the court held that since the criminal action and the disciplinary proceedings were grounded upon the same sets of facts, the disciplinary proceedings should have been stayed and the High Court was not right in interfering with the trial court's order of injunction.

[Decided on 6th September 1988. For the original text please refer to AIR (December) 1988 SC 2118.]

5. Government Servant has no Right to Extension Beyond the Age of Superannuation

STATE BANK OF BIKANER & JAIPUR v. JAG MOHAN LAL

Previously the employment relations were governed by contract rules. Under that system the bargaining position of the employee and employer was unequal. The unequal terms, in the employer-employee relationship compelled the government to intervene and to provide protection to the employees by framing service rules and regulations. Though the court cannot interfere in government's policy matters, it can yet adjudicate on the constitutional validity of the rules and regulations framed by the government concerning employees.

In the instant case, the Rule regarding right to get extension of service beyond the age of superannuation has heen considered. Mr. Jag Mohan Lal was an officer of the State Bank of Bikaner and Jaipur. His service conditions were regulated by the State Bank of Bikaner and Jaipur (Officers) Service Regulations 1979. The regulations came in force with effect from 1st October 1979. Regulation No. 19 provided for the age of retirement of the same time giving discretion to the Bank to extend the period of service of any officer beyond the age of retirement if considered fit for the job and if in the interest of the Bank. The Regulation 19 reads as under:-

"Age of retirement":

19(1) An officer shall retire from the service of the Bank on attaining the age of fifty-eight years or up to the completion of thirty years of service, whichever occurs first.

Note: However, the existing practice of utilizing the service of officers beyond the age of 58 years by considering individual cases for grant of extension will continue only in respect of employees who joined the service before July 19, 1969. Further such employees may be granted extension in service instead of re-employment as is the case in the State Bank of Mysore and State Bank of Saurashtra. A suitable diary note should be made in this regard and carried over at intervals to ensure that this factor is not overlooked at the time when the cases of employees who joined on or after 19th July, 1969 come up for consideration (PER/32/80 dated 20th May 1980). Provided that the competent authority may, at its discretion, extend the period of service of an officer who has attained the age of 58 years or has completed 30 years of service as the case may be, should such extension be deemed desirable in the interest of the bank.

On 14th June 1979 the Bank intimated Shri Jag Mohan Lal that he was granted extension of service upto 28th September 1982, that is, till the time he completed 58 years of age. By a second letter which he received on 1st July 1982, he was told that he would be attaining superannuation age of 58 years on 30th September 1982 and would stand retired on that date. Accordingly he was retired from service with effect from 30th September 1982.

He did his best at the departmental level to get his retirement reconsidered. But he was informed that his case did not fit the service guidelines of the Bank.

Mr. Lal moved the High Court for relief under Article 226 of the Constitution. The Bank resisted the petition and took the following pleas:

"the extension is considered on three parameters:

(i) continued utility,

(ii) good health, and

(iii) integrity beyond reproach."

For granting extension, all the above three tests have to be fulfilled. In the case of Mr. Lal, his services were not extended because his continued utility in the service of the Bank was found to be restricted. It was also submitted that it was not open to the petitioner to claim that extension should be granted to him as a matter of right. Moreover one incident of his refusal to accept the transfer order in the year 1981 was cited as an example of insubordination.

Meanwhile by the time the petition came up for consideration Mr. Lal attained 60 years of age and the learned single judge dismissed the petition without going into the merits of the matter. Appeal was made before a Division Bench of the High Court. The Division Bench accepted the appeal and gave relief to the employee on the following grounds:

> It is true that the right of extension of service is not a legal right, but it is a benefit. However, this benefit is not a concession but is a privilege to which an officer is entitled after years of hard work in the Bank.

The Bench also pointed out that the Bank took into consideration only the criteria whether his extension would be desirable to the Bank but it did not apply its mind on whether his services were found useful on grounds of the employee's health and integrity. This showed that the Bank took an arbitrary decision.

On appeal to the Supreme Court, the High Court's judgement was reversed. The Supreme Court held that the High Court had completely misunderstood the nature of right claimed by the employee. Under

the Rules, an employee has a legitimate right to remain in service till he attains the age of superannuation. But beyond that age he has no such right unless his service is extended by the bank. The provision provides for the discretion available with every employer, every management, State or otherwise to extend the service beyond superannuation, provided such extension is desirable in the interest of the organisation. If the bank considered that the service of an officer was not desirable in the interest of the bank, it had every right to disallow him to continue in service beyond the age of superannuation. Such a decision of the bank is no reflection on the officer. It causes no stigma. The contention of the respondent that the Bank falls within the concept of 'state' for the purpose of fundamental rights and therefore extending service of some and rejecting the case of others amounted to violation of Article 14, was also dismissed by the Supreme Court. The court held that the Bank had no obligation to extend the services of all officers even if they were found suitable in every respect. In one year there may be a numher of retirements and the Bank may not require the services of all retired persons. The Bank in such a case, is within its rights to exercise discretion. The Supreme Court concluded that there was no scope for complaining arbitrariness in the matter of giving extension of service to retiring persons.

[Decided on 13th September 1988. For the original text please refer to (1988) 20 Reports SC 372.]

6. No Interest on Delayed Gratuity Amount if not Properly Channelled

CHARAN SINGH v. BIRLA TEXTILE

The Payment of Gratuity Act 1972 is a social legislation. The Act provides a beneficial scheme for the payment of gratuity to employees engaged in factories, mines, oilfields, ports, Railways, companies, or other establishments. An employee who is eligible for payment of gratuity shall apply within thirty days from the date the gratuity becomes payable. In the case of superannuation or retirement, the

employee may apply to the employer before thirty days of superannuation or retirement under Section 7 of the Act. The employer within fifteen days of the receipt of the application shall issue notice for payment to the employee under Section 8 of the said Act. But generally employers do not pay the gratuity within the prescribed time and the employees suffer from unnecessary hardships. In this case, the Supreme Court has considered the question "whether the employee can get the interest on the delayed amount of gratuity."

Applicant Charan Singh joined service under the Birla Textile Mill in April 1944 and was relieved from service on his resignation with effect from 24-5-83. The employer did not determine the amount of gratuity payable to the appellant as required under Section 7(2) of the Act.

On 7-6-83 the appellant furnished an application on prescribed form for payment of gratuity but no action was taken by the employer. Appellant approached the statutory controlling authority for determination of the amount of gratuity and requested that due interest may be paid on the quantified amount.

On 3-12-84, the controlling authority determined the amount of gratuity at Rs 16,380 and directed the employer to pay the same along with compound interest at 9 per cent. Thereupon the employer challenged the order before the Appellate Authority. The Appellate Authority affirmed the determination but set aside the order for the payment of interest.

The case came before the Supreme Court. The Supreme Court heard both parties in regard to payability of interest. The cause of action arose in 1983. The court examined the Sections 7 and 2 of the Payment of Gratuity Act. Section 7 lays down the provisions for determination of the amount of gratuity and section 8 states the provision for recovery of gratuity. The provisions of Section 7 have been amended twice, first by Act 25 of 1924 with effect from 1-7-1984 and again by Act 22 of 1987. The 1987 amendment in Section 7 of the Act is as under:

(3) The employer shall arrange to pay the amount of gratuity within thirty days from the date it becomes payable to the person to whom the gratuity is payable.

(3A) If the amount of gratuity payable under Section(3) is not paid by the employer within the period specified in Sub-Section(3)

the employer shall pay from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate not exceeding the rate notified by the Central Government from time to time repayment of long term deposits, as that Government may, by notification.

Section 8 of the Payment of Gratuity Act runs as under:

Recovery of Gratuity—If the amount of gratuity payable under this Act is not paid by the employer, within the prescribed time, to the person entitled thereto, the controlling authority shall, on an application made to it in this behalf by the aggrieved person, issue a certificate for that amount to the collector, who shall recover the same, together with compound interest thereon, at the rate of 9% per annum, from the date of expiry of the prescribed time, as arrears of land revenue and pay the same to the person entitled thereto.

After considering the facts and going through Sections 7 and 8 the Supreme Court decided that the appellant had not applied for the recovery of gratuity to the Collector. It is only when the Collector issues a certificate for recovery of the dues as a public demand that interest as provided under Section 8 is admissible.

When the gratuity was quantified, there was no provision in the Act for payment of interest and the collector had to be approached for its realisation. It was to cover this lacuna in law that amendment to Section 3 to incorporate S. 3-A, had been introduced in 1987. The Supreme Court on the above grounds, held that the appellant was not entitled to interest on the amount of gratuity found due to him.

[Decided on 3rd August 1988. For the original text please refer to 1988(II) CLR (SC) 1988.]

IV
Family Law

1. Degree of Mental Disorder to be Proved in a Petition for Divorce

RAM NARAIN GUPTA v. SMT. RAMESHWARI GUPTA

The context in which the ideas of 'unsoundness of mind' and 'mental disorder' occurring in law as grounds for dissolution of a marriage, requires the assessment of the degree of the 'mental disorder.' Its degree must be of such an extent that the spouse seeking relief cannot reasonably be expected to live with the other. If the mere existence of any degree of mental abnormality could justify dissolution of a marriage, few marriages would, indeed, survive in law.

In the instant case, the Appellant husband's suit for a decree of dissolution of his marriage with the wife on the grounds envisaged in Section 13(1)(iii) of the Hindu Marriage Act 1955, had been decreed by the court of first instance but dismissed by the High Court in appeal. The marriage between appellant Ram Narain Gupta and Rameshwari Gupta was solemnised on 17-6-1979 at Jhansi. The suit for dissolution of marriage was filed on 14-7-83 on the allegation that the wife was 'schizophrenic' of severe order and had been treated by the doctor at the Department of Psychiatry at the Medical College, Jhansi, and that despite competent professional treatment, the mental condition of the wife continued to deteriorate to the point of making manifest in her suicidal tendencies and aggressive violent behaviour towards others. Appellant, therefore, averred that the mental disorder of the wife was of such a kind and to such extent that he could not reasonably be expected to live with her as man and wife.

The wife, in her written statement, denied the imputation of insanity and contended that the appellant wanted to get rid of her at the instigation of his mother and sisters. She herself entered the witness box to substantiate her defence. She also produced a copy of the order

passed by the Magistrate in proceedings under the Lunacy Act initiated by the husband for her committal to mental asylum. In those proceedings, it appeared, the Magistrate, after examining her, had stated to have found no abnormality in her, requiring institutionalised treatment.

The appellant, on his side, called Dr. Shukla, Head of the Department of Psychiatry, Maharani Laxmi Bai Medical College, to support his version. He also relied upon certain incidents which occurred on 1-7-83 in which the wife was alleged to have exhibited unprovoked violence towards husband's sisters and inflicted injuries on their person. The trial court accepted the appellant's evidence and recorded a finding that the wife was schizophrenic and granted a decree for the dissolution of marriage.

The decree, however, was reversed by the High Court. High Court held the view that having regard to the various kinds of schiozphrenias or rather the various ways in which that mental illness is known to manifest itself, it would be necessary for the husband to go further and establish the degree and severity of the mental illness which would alone satisfy the requirement of the ground for dissolution of marriage envisaged in Section 13(1)(iii) of the Act. It is only when the schizophrenic is of the third variety i.e. Katatonia, that the patient is in a state of wild excitement, destructive, violent and abusive. There was no substantial proof to support the husband's contention that the wife suffered from Katatonia. The High Court also noticed that the medical certificate of wife's mental illness was issued on 2-7-83 after the incidents on 1-7-83 when the wife had lodged the first information report with the police complaining that she had heen assaulted by the husband's family. The husband attempted the very next day to commit her to a mental asylum. The High Court held that the second medical certificate issued by Dr. Shukla certifying the wife's mental illness, had to be seen in the sequence of the above events. Further, Dr. Shukla did not state anywhere that the schizophrenia was of Katatonia variety. The High Court, therefore, concluded that the mental disorder of the wife was not of such kind and to such extent that the husband could not live with her safely.

In appeal to the Supreme Court, the appellant assailed the correctness of the approach of the High Court. It was contended that the High Court having accepted the fact that the wife did suffer from schizo-

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phrenia, fell into error in considering the disease non-serious and concluding that the husband could yet live with her. The Supreme Court observed that according to Section 13(1)(iii), the 'unsoundness of mind' or 'mental disorder' to form the ground for divorce has to be of such a kind and to such an extent that the spouse seeking relief cannot reasonably be expected to live with the other. The burden of proof of the existence of the requisite degree of mental disorder is on the spouse claiming relief. The court quoted the following excerpt for Karl Menninger's 'Communication and Mental Health', in support:

> We hold that mental illness should be thought and spoken of less in terms of disease entities than in terms of personality disorganisation. . . . (It is to be understood by) what it indicates in regard to the process of disorganisation and reorganisation of personality which is in a fluctuant state of attempted adjustment to environmental reality. Is the imbalance increasing or decreasing? To what is stress related/What latent capacities for satisfaction in work, play, love, creativity, are discoverable for therepeutic planning? And this is language that can be understood. It is practical language and not language of incantation and exorcism.

Supreme Court held that this medical concern against too readily reducing a human being into a functional non-entity and as a negative unit in family or society is law's concern also and is reflected, at least partially, in the requirements of Section 13(1)(iii). In the last analysis, the mere branding of a person as schizophrenic will not suffice. For purposes of Section 12(1)(iii) 'schizophrenia' is what schizophrenia does.

On the basis of the above argument, the court dismissed the appeal and upheld the judgement of the High Court.

[Decided on 12th September 1988. For the original text please refer to AIR (December) 1988 SC 2260.]

2. Muslim Women (Protection of Rights on Divorce) Act 1986 has no Retrospective Operation

S.K. Mohammad Ali v. Salima Khatoon

Muslim women are not only discriminated against in the society, but are unable to avail of even such rights as are available to them under the law. Muslim women are more vulnerable than others because they are victims of practices like talaq (unilateral right of the husband to divorce his wife), polygamous marriage etc., and suffer destitution after divorce with the absence of adequate compensation for themselves and their children.

In this case the husband gave 'talaq' to his wife in March 1983. His wife claimed maintenance under Section 125 Cr.P.C. and the learned Judicial Magistrate allowed the maintenance by his order of 24-9-85. The husband preferred an appeal against the order in the court of the learned Session Judge, Howrah. The Session Judge by his order of 17th January 1986 rejected the petition for stay. On 17th December 1987 an application was filed on behalf of the husband before the learned Judicial Magistrate 1st Class, Amta to set aside the order of maintenance in the light of express provision of the newly enforced Muslim Women (Protection of Rights on Divorce) Act 1986. The learned Magistrate by his order dated 22nd December 1987 rejected the application on the ground that the said Act came into force in the year 1986 and the petitioner's case had been dismissed in the year 1985. Since the Act has not heen given any retrospective effect the husband could not ask for any change in court's decision.

Aggrieved by the said order the husband filed a revisional application for setting aside the order. The case was referred to the Division Bench of the High Court of Calcutta. The High Court discussed the three judgements passed by the single judges of its own courts and held that Muslim Women (Protection of Rights on Divorce) Act came into operation with effect from 19th May 1986. If the application in question for granting maintenance under Sectron 125 of the Code of Criminal Procedure had been pending before the trial court when that Act of 1986 came into operation, that application under Section 125

of the Code ought to have been decided according to the provisions of the said Act of 1986. But in the instant case, the point of consideration was whether the orders passed under Section 125 Cr.P.C. before the said Act of 1986 came into operation would be affected by the provision of this Act.

After thorough consideration of the provisions of the Act of 1986 the High Court decided to uphold the order of the learned trial court concluding that as the Act had not been given any retrospective effect the order passed under Section 125 Cr.P.C. would stand and could not be affected by the provisions of the Act of 1986. The language of the Act clearly shows that this Act has not been given any retrospective effect or operation. Section 7 of the Act provides:

> Every application by a divorced woman under S.125 or under S.127, Cr.P.C. 1973 (2 of 1974), pending before a Magistrate on the commencement of this Act, shall, notwithstanding anything contained in that Code and subject to the provisions of S. 5 of this Act, be disposed of by such Magistrate in accordance with the provisions of this Act.

In the present case no application by the divorced woman under S.127 of Cr. P.C. was pending before the Court when the said Act of 1986 came into operation. This fact coupled with the non-retrospective effect of the Act led the High Court to reject the petition for setting aside maintenance granted under S.125 Cr.P.C.

[Decided on 1st July 1988. For the original text please refer to (1988) 24 Reports (cal) 486.]

3. Jail is not a Mode of Satisfaction for Non-Payment of Maintenance

SMT. KULDIP KAUR v. SURINDER SINGH

The object of a proceeding for maintenance is to prevent destitution by compelling the husband to maintain his wife and child who have no other financial means to support themselves. These provisions are not in the nature of penal provisions but are only intended for the

enforcement of a duty, a default in which may lead to vagrancy. The provisions of Section 125, though part of the criminal law, are essentially remedial and not punitive. In several cases gross injustice is caused to a divorced wife when the husband can evade his obligation to maintain her. The order by the court for monthly allowance can be discharged only upon the monthly allowance being recovered. The liability cannot be said to have been discharged by sending the person liable to pay the monthly allowance to jail. It is only a mode or method of recovery and not a substitute for recovery.

This is a case of wife wronged by her husband and a child wronged by his father who had to suffer also at the hands of the court. On 4th July 1981 the Metropolitan Magistrate Shri L.D. Malik decided the case of Smt. Kuldip Kaur for maintenance. He awarded a sum of Rs 200 to her and Rs 75 to her son. The learned Magistrate recorded a clear finding that the husband was guilty of cruelty and neglect of the wife in the context of the demand for dowry.

The husband neglected to pay the maintenance amount. The wife moved an application for execution of the order to recover the arrears of maintenance which amounted to Rs 5,090. On 17th January 1982 the husband was sentenced to suffer simple imprisonment for one month with the condition that the husband shall be released if payment of Rs 5,090 was made.

The wife prayed for recovery of the arrears but the Metropolitan Magistrate rejected her prayer on the ground that the claim for arrears stood satisfied upon the husband having been sent to jail.

Since the needs of the wife and her minor child could not be satisfied by the imprisonment of the husband for one month, she approached the High Court by way of revisional application. The High Court on 29th July 1982 rejected the application summarily without a speaking order. The High Court's decision did not rely on any provision of law and was based on the assumption that the claim for recovery stood satisfied upon the husband being sent to jail.

The aggrieved wife made an appeal by special leave to the Supreme Court. The Supreme Court failed to comprehend how such an important question arising in the context of the petition preferred by a helpless woman could have heen summarily rejected by the High Court by a non-speaking order. The Supreme Court further observed that

the High Court had betrayed total lack of sensitivity to the plight of a helpless woman.

Drawing a distinction between a mode of enforcing recovery of dues on the one hand and effecting actual recovery of the amount of monthly allowance which had fallen in arrears on the other hand, the Supreme Court held, that sentencing a person to jail is a 'mode of enforcement'. It is not mode of satisfaction of the liability. The liability can be satisfied only by making actual payment of the arrears. Section 125(3) of Cr.P.C. deals with the problems arising in the context of a person failing without sufficient cause, to comply with the order of paying of maintenance. According to this, "if any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made."

Section 125(3) deals with one of the modes for enforcing the order of maintenance allowance. A person who, 'without sufficient cause' fails to maintain his wife and child would not be absolved from his liability merely because he prefers to go to jail. Sentencing to jail is a means to achieve the end of enforcing the order by recovering the amount of arrears. It is not a mode of discharging liability.

The Supreme Court, therefore, allowed the appeal and set aside the order of High Court and directed the husband to pay Rs. 275 (Rs 200 for the wife and Rs 75 for the child) from 15th August 1986. The amount was to be paid up to 15th of every succeeding month. On failure to pay, the learned Metropolitan Magistrate would issue for warrant of arrest and put him to jail till he pays the amount. As regards the arrears the court also ordered that the husband must pay the amount of Rs 5090 plus the amount which had become due up to 15th August 1986, but he would not be sent to jail for this as per the appellant's wishes.

[Decided on 3rd November 1988. For the original text please refer to (1988) 18 Reports SC 412.]

4. Guardians and Wards Act (8 of 1890) Applies to Mohammedans also

ABDUL KALAM v. AKHTARI BIBI

This appeal was directed against the order of the Additional District Judge, Cuttack, directing that the minor child be kept in custody of his mother till he completes the age of seven years whereafter the father would have the custody of the child. The parties were Mohammedans and were governed by Hanafi School of Mohammedan law. The son was only two years of age when his father divorced his mother and drove her out of his house, forcibly keeping the child with him. The mother petitioned for the custody of her minor child. The father contended that his wife, i.e. the mother of the child, was a lady of loose morals and had absolutely no means to sustain the child. The District Judge on consideration of the legal position regarding the guardianship of a minor child came to the conclusion that the welfare of the child was of paramount importance and for a child of two or three years old, undoubtedly the mother would be the proper person to have the custody of child. Accordingly he directed that the mother should have the custody of the child till he completed the age of seven years. Thereafter the father may get the custody of the son.

In appeal to the High Court, the counsel for the father raised three contentions:

(1) A bare perusal of Section 25 of the Guardians and Wards Act would indicate that it has no application to a Muslim child since under the personal law of the Mohammedan, father is the guardian of the person and, therefore, the question of removing from the custody does not arise.

(2) The application filed by the wife was required to be filed in the form provided for under Section 10 and all the particulars contained in the said form had not been filled up. Therefore the application was defective.

(3) On the evidence of this case, the learned trial judge committed an error in coming to the conclusion that the interest of

the minor son will be best served if the custody was given to the mother.

The High Court held that there was no substance in the contentions. The word 'guardian' has been defined in Section 4(2) to mean a person having care of the person of a minor or of his property, or both his person and property. It applies equally to Hindus and Muslims. In fact the term 'guardian' used in the said Section will stand for all guardians whether testamentary, certificated natural or de facto and was not confined to statutory guardian alone. A Muslim mother having the care of a son of two year's age would be the child's guardian within Section 4(2) of the Act and when the child is taken away from her by the father who is the natural guardian of the child, the mother has a right of Hizanat under Mohammedan law and, therefore, she would be fully entitled to apply under Section 25 of the Act.

As regards the second contention, the court held that non-mention of the names of near relations of the minor under Section 10(1)(a) would not make the applicption non-maintainable partiularly when the mother was the applicant.

Coming to the last submission, the court held that the Act confers a discretion which had to be exercised for the protection and welfare of the children. The court must consider the interest of the child before awarding custody to either of the parents. As held by Supreme Court in the case of *Dr. Mrs. Veena Kapur v. Varinder Kumar Kapur*, AIR 1982 SC 729, the mother is considered more suitable to have the custody of a child of such tender age. A child of such tender age requires love and affection and proper care which is normally expected of from the mother. The order of the district judge has been passed with this paramount consideration in mind, namely the welfare of the child. The High Court, on this reasoning, dismissed the appeal.

[Decided on 31st July 1987. For the original text please refer to AIR (December) 1988 Orissa 279.]

V
Land Law

1. Words 'Landless Persons' not to be Interpreted Literally

U.P. Bhoodan Yagna Samiti, U.P. v. Braj Kishore

The purpose of Bhoodan Yagna, which was started by late Acharya Vinoba Bhave, was to make land available to 'Bhoomihin Kisans' or those poor agricultural labourers whose main source of livelihood was agriculture but who had no lands of their own. The U.P. Bhoodan Yagna Act (10 of 1953) was passed with this objective but it used the phrase 'landless persons' in place of 'Bhoomihin Kisan'. Taking advantage of this term and the rule of interpretation that words should be given its plain ordinary dictionary meaning, some traders and propertied people based on cities, got the land settled in their name. In the instant case, the respondents who resided in the city of Kanpur and were prosperous businessmen managed to obtain grant of land in village Jahangirabad, Pargana, Quatampur, Dt. Kanpur under Section 14 of the U.P. Bhoodan Yagna Act from Bhoodan Yagna Samiti on 15-5-1972. On the basis of the report furnished by Tehsildar Quatampur, the Additional Collector, Kanpur, issued notices to the respondents requiring them to show as to why the settlement obtained by them be not cancelled on following grounds:

(i) As the petitioners did not reside in the village where the plots were situated, they had obtained the grants fraudulently and by misrepresenting facts.

(ii) As the petitioners did not fall in the category of landless persons it was not proper to make the grants in their favour.

(iii) The grants had not heen approved by the Government of U.P. On considering the statements filed by the respondents the Additional Collector came to the conclusion that the order

could not be justified. In his opinion rich businessmen did not fall in the category of 'landless persons' as contemplated under the Act and the grants made in their favour in the year 1968 were irregular and liable to be set aside. By this order dated 1-1-1976 he quashed all the grants made in favour of the three respondents. A writ petition was filed against this order in the High Court of Allahabad.

Before the High Court, two questions were raised. The first questioned—the jurisdiction powers of the Additional Collector under the Act and the other related to the legality of the Additional Collector's viewpoint. So far as the first point was concerned, the High Court decided that the Additional Collector had jurisdiction to enquire into the matter. As regards the second point, it was the contention of the petitioners before the High court that Section 14 of the Act enables the Samiti to settle the land vested in it with 'landless persons'. The Section neither specifies that such 'landless persons' should also be agricultural labourers nor is it provided that they have to be residents of the place in which the concerned lands were located. The High Court felt the argument was valid and the settlement made in the favour of respondents was justified. Accordingly the High Court quashed the order of the Additional Collector. The U.P. Bhoodan Samiti appealed to the Supreme Court against the High Court's decision.

It was contended before the Supreme Court by the Samiti that Section 14 of the Act should be interpreted in the light of Section 15. According to section 15:

Grants to be made in accordance with Bhoodan Yagna Scheme—All grants shall be made as far as may be in accordance with the scheme of Bhoodan Yagna.

It could not be disputed that Bhoodan Yagna scheme only contemplated allotment of lands in favour of those landless agricultural labourers who were residing in the villages concerned. It is for this reason that Section 14 was amended in 1975 and the words 'landless persons' were replaced by 'landless agricultural labourers'. This substitution was made necessary only because such errors were committed in understanding the meaning of the words 'landless persons.'

The Supreme Court observed that if one had noticed even the slogan of the Acharya Bhave's movement or its basis and purpose to give

land to 'Bhoomihin Kisans' no court would have come to the conclusion regarding the term 'landless persons' which has heen arrived at in the impugned judgement. When one has to interpret law, one must look at the intention of the legislature and for that one must look into the circumstances under which the law was enacted. As described in 'Vinoba and his Mission' by Suresh Ram, the fundamental principle of the Bhoodan Yagna movement was that all children of the soil have equal right over the Mother Earth. Therefore land should be equitably redistributed anew and land should be provided to those landless labourers who were versed in agriculture and had no other means of subsistence.

The judgement of the High Court was accordingly set aside and orders passed by the Additional Collector were restored.

[Decided on 9th September 1988. For the original text please refer to AIR (December) 1988 SC 2239.]

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